

Feldman, Stephen (Perkins Coie)

From: Feldman, Stephen (Perkins Coie)
Sent: Wednesday, March 19, 2014 11:59 PM
To: corey@farlawfirm.com
Cc: Will@farlawfirm.com
Subject: FW: Queen Ave - Third Work Authorization Agreement
Attachments: image002.jpg; image003.jpg

Corey,

Your email below jumps to incorrect conclusions, and makes assertions that are without foundation.

First of all, it is not true -- no matter how many times you say it -- that my clients "have no intention of paying River City for its work." On the contrary, if River City fully performs its obligations under the Contract (and the Settlement Agreement), then my clients will pay River City what it is owed.

Second, you baldly assert that my clients "well knew that the Work Authorization was intended to only cover work performed pursuant to the Second Work Plan." That is simply not true. My clients understood that the "Work Authorization" (i.e., the Contract) was intended to cover precisely what it said it was covering -- namely, "transportation and disposal of unneeded commercial chemical products" and "cleaning and disposal of tanks/piping containing chemical products or wastes." We also disagree that the parties' course of dealing or any extrinsic evidence support your apparent position that River City is not obligated to perform the services that it contracted to perform.

Third, while you concede that "NRC is cleaning the tank tomorrow morning at River City's expense," you ignore the fact that all of the remaining items of equipment that need to be cleaned and/or disposed of are likewise the property of River City. Thus, just like the tank, it is River City's responsibility (regardless of one's interpretation of the Contract) to clean and dispose of the other remaining items of equipment that still require cleaning and/or disposal.

Fourth, you are off base in contending that an "impossibility" defense will operate to shield River City from any breach of its obligation to remove all of the Transferred Assets by March 31. This is because the only reason why EPA would not allow any Transferred Assets to be removed from the site is if River City fails to honor its contractual obligations. Stated differently, if River City abides by its contractual commitments, then EPA will have no reason to prevent River City from removing any of the Transferred Assets. It goes without saying that River City cannot rely on an impossibility defense under such circumstances.

Finally, it should be noted that while you are quick to accuse my clients of "playing games" and not operating in "good faith," the opposite appears to be true. Indeed, at 4:36 p.m. this afternoon, I received an email from your colleague, Will Patterson, stating that unless my clients sign a new contract with River City (to perform services that my clients firmly believe River City is already obligated to perform) and do so by 5:00 p.m. (i.e., within 24 minutes), then River City would discontinue its work on the project. Not only that, the 4:36 email also made additional outrageous demands under threat of River City "walking off the site," with such demands including the immediate release of the \$50,000 in escrow, which you now (correctly) concede my clients are "not obligated" to release.

All that being said, I reiterate what I said before, which is that my clients would much prefer to resolve this matter without resorting to litigation, and that they remain willing to try to come to a mutually acceptable resolution that will enable the remaining work on the project to be completed in a timely fashion.

I will, as you suggest, call you in the morning to discuss this matter.

Stephen

From: Corey Tolliver [corey@farlawfirm.com]
Sent: Wednesday, March 19, 2014 10:00 PM
To: Feldman, Stephen (Perkins Coie)
Cc: Will@farlawfirm.com
Subject: RE: Queen Ave - Third Work Authorization Agreement

Stephen,

Will forwarded me your email. I'd like to share a few thoughts with you before this matter reaches a courtroom.

It appears that my clients' fears were well founded. Your clients have been playing games, trying to get River City to perform work for which your clients had no intention to pay. You gave us the indication yesterday that your clients were thinking of not paying River City for its work. Had River City not seen through their scheme, it would have lost tens of thousands of dollars in reliance upon your clients' vague assurances that they agreed to pay River City already, so River City should just keep working. You have now made it abundantly clear that your clients have no intention of paying River City for its work, and apparently haven't had the intention to pay for quite some time now. That is a black letter, text book, time honored example of repudiation. Even if your argument was correct that the previous agreement covers the new Work Plan, River City is under no obligation to engage in further performance until it receives adequate assurances that your clients will honor their end of the supposed bargain. One party does not get to lie in wait while the other party performs and then announce that they had no intention of ever paying for that performance. I am confident that in such a situation, no court would require River City to continue working.

It is also unfortunate that your clients have resorted to letter warfare and posturing, instead of working in good faith to resolve this dispute and keep this project on track. If your clients would just agree to pay for the work they are asking River City to perform, we could put this matter behind us and get this project done. Nonetheless, if all your clients would like to do at this point is posture for a lawsuit, I address each of your numbered points below. I truly hope your clients decide to do the right thing.

First, you are under the mistaken belief that the Work Authorization dated February 12, 2014, somehow contractually obligates River City to undertake the EPA's new scope of work. You cannot interpret this Work Authorization in a vacuum, especially without reference to the specialized meaning given various terms by the parties. Your clients well knew that the Work Authorization was intended to only cover work performed pursuant to the Second Work Plan. The Work Authorization was meant to cover River City standing by to handle any disasters caused by the wholly unqualified people that your clients contracted with to scrap the facility, without consulting with or even informing River City. Each time there was a new Work Plan (and there have been quite a few on this project), River City entered into a new Work Authorization with your clients to address the new scope of work. Look no further than the fact that the Work Plan that you argue River City is already obligated to perform "is intended to address remaining tanks, piping, pumps and carbon scrubbers." The Work Authorization that you argue covers this scope does not even mention "carbon scrubbers."

Even if it was not obvious to anyone looking at the course of dealing and course of performance between these parties, and the usages of terms in the trade, such as "stand by" as opposed to "do everything," the contract would be ambiguous under *Yogman*, allowing for extrinsic evidence of the parties' intent. Numerous people will attest to River City's interpretation of the agreement.

Second, I agree, your client is not obligated to make the \$50,000 payment, now. We did not intend to indicate otherwise. Simply put, we rightly intuited that your clients had no intention of paying, and so we demanded full payment, now, if they wanted River City to undertake the new work. River City is entitled to craft its offer how it sees fit, and your clients are welcome to reject that offer, which they did.

Third, you are incorrect. NRC is cleaning the tank tomorrow morning at River City's expense. We tried to clarify this for you last night.

Fourth, River City has every intention of performing its obligation to remove the property by the agreed upon date, if possible. The EPA will not allow the property to be removed from the site, thus creating a classic impossibility of performance, thereby excusing performance. Should the EPA allow the property to be removed timely, River City will certainly get the property removed. Moreover, to assuage any of your clients' concerns, River City has obtained the consent of Pacific Cast to leave the property on-site, if it cannot be removed by the deadline. This is not an anticipatory repudiation of the settlement agreement; River City intends to comply with the terms of the settlement agreement.

Fifth, again, your clients cannot force River City to work for free. I've addressed this concern above.

Finally, I'm happy to address any specific concerns your clients may have about the specificity of the invoicing. It is my understanding that your clients have never raised any concerns regarding the form of the invoices in the past.

River City will complete full performance of the existing Work Authorization tomorrow. Even if your assertion was correct that the Third Work Plan was covered by the February 12, 2014 Work Authorization form, your clients have repudiated the supposed agreement by stating that they will not pay for the work that has been performed or will be performed. Remember, there is no "good faith" exception to repudiation. Your clients repudiate at their peril.

Hopefully your clients will stop posturing for a lawsuit and work with River City to get the remaining work completed timely. The EPA will bring in their own contractors at significant expense to your clients. Furthermore, please advise your clients on the ramifications of the indemnity provision contained in the February 12th Work Authorization on their assertion that they will look to River City for costs incurred by the EPA. Your clients' best option is to commit to honoring their existing agreement and enter a new agreement for the new work that will assure that River City will get paid for the work your clients are asking it to undertake.

Please give me a call in the morning to discuss.

Corey Tolliver

[T] 503-546-4620

[F] 503-517-8204

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Folawn Alterman & Richardson LLP

Fox Tower

805 SW Broadway, Suite 2750

Portland, Oregon 97205

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From: Will Patterson
Sent: Wednesday, March 19, 2014 7:51 PM
To: Corey Tolliver
Subject: Fwd: Queen Ave - Third Work Authorization Agreement

Sent from my iPhone

Begin forwarded message:

From: "Feldman, Stephen (Perkins Coie)" <SFeldman@perkinscoie.com<<mailto:SFeldman@perkinscoie.com>>>
Date: March 19, 2014 at 7:50:16 PM PDT
To: "'Will Patterson'" <Will@farlawfirm.com<<mailto:Will@farlawfirm.com>>>
Subject: RE: Queen Ave - Third Work Authorization Agreement
Will,

River City's position regarding this matter is unfortunate and several items in your email below are inconsistent with the actual facts. I will address a few of the most glaring errors in River City's position.

First, River City appears to be under the mistaken belief that it contracted to perform only the work associated with the so-called "second EPA plan," and not also the work associated with the so-called "third EPA plan." A review of River City's "Services Work Authorization Form" (the "Contract") executed on or about February 12, 2014, reveals that River City, in fact, contracted to perform the following Services: "Stand by emergency cleanup, transportation and disposal of unneeded commercial chemical products, and cleaning and disposal of tanks/piping containing chemical products or wastes on-site." There are no temporal or other limitations regarding the scope of work that is to be performed by River City, including, in particular, no limitation related to River City having to perform only the work covered by the so-called "second EPA plan." Rather, according to the Contract, the Services that River City agreed to perform expressly include, without limitation or qualification, "transportation and disposal of unneeded commercial chemical products" as well as "cleaning and disposal of tanks/piping containing chemical products or wastes." Given this contractual language, there can be no genuine dispute that River City has agreed to transport and dispose of all unneeded commercial chemical products, and it has further agreed to clean and dispose of all tanks/piping containing chemical products or wastes.

Accordingly, if River City makes good on its threat to “walk off the site” and, thus, fails to fully perform the Services it contracted to perform, it will be in breach of the Contract.

Second, River City’s demand for immediate payment of the \$50,000 that is currently in escrow, as well as its demand for the placing of additional funds in escrow, are patently inconsistent with the contractual terms to which River City has agreed. The Contract states that: “Customer and [River City] shall jointly instruct escrow to reserve \$50,000 in escrow until the completion of the Services. Customer and [River City] shall jointly instruct escrow to pay \$50,000 to [River City] on completion of the Services, or the reasonable value of [River City’s] services, whichever is lesser.” (Emphasis added.) It is indisputable that the condition precedent to the release of any of the funds from escrow (i.e., the “completion of the Services”) has not yet occurred. Indeed, as explained above, the Services include, among other things, the disposal of all unneeded commercial chemical products and all tanks/piping containing chemical products or wastes; yet, as acknowledged in your email below, such disposal activities still remain to be done.

Third, as I mentioned to you during one or more of our recent conversations, the items of equipment at the Queen Ave. Property that remain to be cleaned and/or disposed of are, to the best of my knowledge, equipment that is now owned by River City. This is because these items of equipment are part of the “Transferred Assets” (as defined in the Settlement Agreement between our respective clients, which is dated February 14, 2014). Not only is it inequitable that River City would seek to charge my clients for the cleaning and/or disposal of River City’s own equipment, but River City has contractually agreed to assume that expense. Specifically, in paragraph 16 of the Settlement Agreement, River City agreed to “remove (including any necessary disconnection or disassembly), at the expense of River City, all Transferred Assets from the [Queen Ave.] Property” (Emphasis added.) Simply put, it is River City’s responsibility to “remove” from the Queen Ave. Property the items that are presently at issue, and once removed, any disposal of those items is likewise River City’s responsibility.

Fourth, if River City discontinues its work at the Queen Ave. Property, it will not only be in breach of the Contract, but it also will be anticipatorily breaching the Settlement Agreement. This is because under paragraph 16 of the Settlement Agreement, River City agreed to remove all Transferred Assets from the Queen Ave. Property “by no later than 45 days after the Effective Date of this Agreement [i.e., by no later than March 31, 2014] (‘Removal Period’).” Moreover, paragraph 16 of the Settlement Agreement goes on to make clear that: “The parties recognize and agree that time is of the essence with regard to the removal of the Transferred Assets, and that [my clients] could sustain serious economic injury if all of the Transferred Assets are not timely removed from the [Queen Ave.] Property within the Removal Period.” Please be advised that this “serious economic injury” includes, among other things, the potential forfeiture of \$250,000 that is currently being held in escrow. Because of this, we must respectfully demand that River City immediately acknowledge its intent to honor its contractual duty to remove all of the Transferred Assets by no later than March 31, 2014. If River City fails to so acknowledge by noon tomorrow (i.e., Thursday, March 20), then my clients will treat such failure as a clear and unequivocal expression of River City’s intent not to perform its contractual duty to remove all of the Transferred Assets by March 31. In the event of such an anticipatory repudiation of the Settlement Agreement by River City, my clients will do the best that they can to mitigate the damages caused by River City’s breach, but we fear that River City’s unjustified abandonment of the job site at this late stage may make it impossible for my clients to find someone who is able to do all the work necessary to remove the remaining Transferred Assets in time. Please know that in the event of an anticipatory breach of the Settlement Agreement along the lines now under discussion, my clients will seek to hold River City responsible for the full scope of the damages incurred by my clients. (I also remind you that my clients will be entitled to recover their attorney’s fees in any such action against River City, as the Settlement Agreement includes a prevailing party attorney fee provision.)

Fifth, River City appears to have lost sight of the fact that most, if not all, of the environmental remediation work that is presently being undertaken at the Queen Ave. Property is being done because River City and/or its subcontractor(s) failed to perform the work fully or correctly the first time around. Please understand that my clients do not believe that they should have to pay for River City (and/or its subcontractor(s)) re-doing of work that my clients have already paid for. Likewise, the reason why EPA was forced to “remobilize” and return to the site on or about February 12, 2014, was because River City and/or its subcontractor(s) failed to perform the work fully or correctly the first time around.

Accordingly, my clients will be looking to River City (and/or its subcontractor(s)) to cover any costs incurred by EPA since February 12.

Finally, River City's demand that my clients agree that invoices issued thus far in connection with the Contract are satisfactory (simply because they resemble the form used by River City in issuing earlier invoices) is completely misplaced. As an initial matter, and as indicated above, my clients do not believe that they should be paying for River City (and/or its subcontractor(s)) having to re-do work for which my clients already have paid and, therefore, my clients must insist on a sufficient degree of detail on River City's invoices. A review of those invoices, however, reveals that they are utterly devoid of detail; indeed, for the most part, the invoices simply list a date and include a generic reference to "Service Technician" and the number of hours purportedly worked by that unnamed technician. What, if anything, the technician actually did is a complete mystery. Furthermore, the invoices include items that are plainly beyond the scope of anything for which my clients should have to pay. For example, the invoices include multiple charges for "Attorney Fees" and "Legal Fees." The inclusion of such items reveals a lack of good faith on the part of River City.

Notwithstanding the fact that River City has consistently acted in a manner inconsistent with its contractual obligations, my clients are willing to try to come to a resolution that will enable the remaining work under the Contract to be completed in a timely fashion. My clients would much prefer to resolve this matter without resorting to litigation, and we hope that, upon reflection, River City will feel the same.

We look forward to receiving the requested acknowledgement by noon tomorrow.

I am available to discuss this matter at any time.

Stephen

Stephen M. Feldman | Perkins Coie LLP

1120 N.W. Couch Street

Tenth Floor

Portland, OR 97209-4128

PHONE: 503.727.2058

FAX: 503.346.2058

E-MAIL: sfeldman@perkinscoie.com<<mailto:sfeldman@perkinscoie.com>>

P Please consider the environment before printing this email. Thank you.

From: Will Patterson [<mailto:Will@farlawfirm.com>]

Sent: Wednesday, March 19, 2014 4:36 PM

To: Feldman, Stephen (Perkins Coie)

Subject: Queen Ave - Third Work Authorization Agreement

Stephen,

I was hoping to speak to you in person about this, but email will have to suffice.

I relayed our conversation regarding the information that Dave Ellis received from the EPA to Steve McInnis. I was informed that although the on-site work may be completed by Friday, there are potentially tens or hundreds of thousands of dollars of disposal costs remaining. My clients have attempted to contact your clients since last week regarding an agreement for the third EPA plan, but were met with silence. As a result, my clients do not trust that your clients have any intention to pay and that your clients intend to contest all invoices in court. Given this belief, my clients refuse to continue work on the third EPA plan and to pay the out of pocket costs for this work and disposal without guarantee of prompt payment.

I have been instructed to provide your clients with a final proposal in order to prevent River City Environmental and its subcontractors from walking off the site once the final work under the second EPA plan is completed. My understanding is that work on the second EPA plan only consists of the removal of drop boxes that are currently on site. I have been

instructed to prepare the attached work services authorization form covering the work for the third EPA plan. As you will see, this agreement also includes the following requirements:

1. Your clients are to immediately issue instructions to release the \$50,000 in escrow to River City.
2. Your clients are to agree that the invoices received to date are reasonable and customary, in light of the fact that the invoices contain the same detail as contained in all previous invoices that have been paid by your clients.
3. Your clients warrant and represent that at least \$250,000 remains in the \$1,000,000 that the purchaser required to be held back from escrow to pay for these additional cleanup costs. Your clients agree to sign an escrow agreement instructing Chicago Title to retain \$250,000 in this holdback and to disburse to RCE the reasonable value of its services upon completion of the Third Work Plan.

My clients want this agreement signed by at least one of your clients by 5pm tonight if RCE is to show up tomorrow to continue work on the third EPA plan. It needs to be signed by all of your clients by tomorrow if RCE is to finish work on the third EPA plan. Additionally, the \$50,000 release from escrow must be received by tomorrow at 5pm in order for RCE to continue work.

Best regards,

Will Patterson

[T] 503-546-4632

[F] 503-517-8204

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Folawn Alterman & Richardson LLP

Fox Tower

805 SW Broadway, Suite 2750

Portland, Oregon 97205

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